# In the Supreme Court of the United States

OCTOBER TERM, 1989

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KOREAN AIR LINES, PETITIONER

*v.*

THOMAS V. MACNAMARA

THOMAS V. MACNAMARA, CROSS-PETITIONER

*v.*

KOREAN AIR LINES

*ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

## QUESTIONS PRESENTED

Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea (8 U.S.T. 2223) provides that "companies of either Party shall be permitted to engage, within the territories of the other Party, * * * executive personnel * * * of their choice." The questions presented in this suit under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) are:

1. Whether Article VIII(1) gives a Korean company operating in the United States the right to select a Korean citizen for an executive position when that choice is based not on citizenship, but on race, national origin, or age.

2. Whether a Korean company is barred from exercising its Article VIII(1) right to select Korean citizens for executive positions in the United States because of their citizenship if that practice has a disparate impact on other individuals of a certain race, national origin, or age.

3. Whether a Korean company's Article VIII(1) right to "engage" executives of its choice encompasses the right to discharge a United States national in order to replace him with a Korean citizen.

4. Whether the court of appeals properly focused on the "executive" status of cross-petitioner's successor, rather than on cross-petitioner's own status, in deciding if Article VIII(1) protected the decision to discharge cross-petitioner in order to replace him with a Korean citizen.

5. Whether the district court abused its discretion in enforcing a discovery cut-off date.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 88-1449

KOREAN AIR LINES, PETITIONER

*v.*

THOMAS V. MACNAMARA

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No. 88-1551

THOMAS V. MACNAMARA, CROSS-PETITIONER

*v.*

KOREAN AIR LINES

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*ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

### STATEMENT

1. Petitioner Korean Air Lines (KAL) is a Korean corporation with branch offices in the United States. In 1974, cross-petitioner Thomas MacNamara began working for KAL as a salesman. In 1977, he was promoted to district sales manager for Delaware, Pennsylvania, and southern New Jersey. In 1982, KAL reorganized its American operations. As part of that reorganization, KAL dismissed MacNamara, who was then 57 years old, and replaced him with a

Korean citizen who was 42 years old and who had entered the United States pursuant to an E-1 treaty trader visa.[1] After the reorganization, MacNamara's replacement served as district sales manager for the area extending from Pennsylvania to Florida. KAL also dismissed its other American managers and replaced them with Korean citizens. Pet. App. A3, A11-A12.[2]

2. Following his discharge, MacNamara sued KAL, alleging that his firing was based on race, national origin, and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* KAL moved to dismiss the complaint on the ground that its conduct was protected by Article VIII(1) of the Treaty of Friendship, Commerce and Navigation (FCN Treaty) of November 28, 1956, between the United States and the Republic of Korea, 8 U.S.T. 2223, T.I.A.S. No. 3947. The first sentence of Article VIII(1) of the FCN Treaty provides: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive per-

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[1] Under the Immigration and Nationality Act, a treaty trader is someone who enters the United States "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national." 8 U.S.C. 1101(a)(15)(E)(i). To gain entry as a treaty trader, an alien must also show that he "will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity." 22 C.F.R. 41.40(a) (1987).

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-1449.

sonnel, attorneys, agents, and other specialists of their choice." 8 U.S.T. 2223.[3]

Treating KAL's motion to dismiss as one for summary judgment, the district court granted the motion (Pet. App. A27-A47). The court construed Article VIII(1) to give Korean companies "the right to select nationals who have Treaty Trader status as executive personnel without regard to American employment laws," and it concluded that KAL had validly exercised that right because it replaced MacNamara with a Korean national who held a treaty trader visa (Pet. App. A42). The district court rejected MacNamara's contention that although Article VIII(1) permits a Korean company to select Korean nationals for executive positions on the basis of their citizenship, it does not confer a right to make such selections because of race, national origin, or age. In its view, this interpretation would nullify the "of their choice" language of Article VIII(1) and impede a foreign company's ability to manage its investments in the host country. Pet. App. A42.

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[3] In *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), the Court held that the identical provision of the FCN Treaty with Japan (Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863) did not protect the employment decisions of a company that was the subsidiary of a Japanese company but was incorporated in the United States. The Court concluded, in accordance with the position of the Executive Branch, that such a subsidiary is a company of the United States, not of Japan, within the meaning of the FCN Treaty. Because the Court found Article VIII(1) inapplicable, it had no occasion to consider the scope of the employment privileges accorded by that Article or their interaction with Title VII. See 457 U.S. at 189-190 n.19. In this case, it is undisputed that KAL is a company of Korea for purposes of Article VIII(1) of the FCN Treaty with Korea, and that KAL therefore is entitled to invoke whatever employment privileges are accorded by that Article.

3. The court of appeals reversed and remanded for further proceedings on MacNamara's claims of intentional discrimination (Pet. App. A1-A26). It held that the purpose of Article VIII(1) "is to assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire" (Pet. App. A9). It also held, however, that "Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship*" (*ibid.*). The court of appeals therefore concluded that "[i]nsofar as Title VII and the ADEA proscribe intentional discrimination on the basis of race, national origin, and age," there is no "theoretical or practical conflict between them and the right conferred by Article VIII(1)" (*ibid.*). See *id.* at A13-A24. On the other hand, the court concluded that "to the extent that Title VII and the ADEA proscribe personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the foreign country involved," there is a "conflict" between Article VIII(1) and the antidiscrimination laws, and that conflict "must be resolved in favor of Article VIII (1)" (*id.* at A9). See *id.* at A24-A26.[4]

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[4] The court of appeals' holding regarding the interaction of Article VIII(1) and the antidiscrimination laws was in accordance with the position of the United States, which filed a brief as amicus curiae.

Like the district court (see Pet. App. A37-A42), the court of appeals rejected MacNamara's arguments that the FCN Treaty right is not implicated because he was not an "executive" within the meaning of Article VIII(1) and because a Korean company's right to "engage" executive personnel of

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or with any live precedent of another court of appeals. Moreover, this case is in an interlocutory posture, because the court of appeals has remanded the case to the district court to permit MacNamara to proceed with his claims of intentional discrimination. In the absence of a fully developed record and a final determination by the courts below on the merits of MacNamara's claims and their interaction with petitioner Korean Air Lines' FCN Treaty rights in this setting, it would be premature for the Court to consider KAL's assertions that the prohibitions in Title VII and the ADEA against intentional discrimination based on race, national origin, or age conflict with KAL's rights under Article VIII(1) of the FCN Treaty. The petition and cross-petition for a writ of certiorari therefore should be denied.

### A. Korean Air Lines' Petition

1. KAL contends (Pet. 7-9) that Article VIII(1) gives it an absolute right to select any Korean national holding a treaty trader visa for an executive position, even if that choice is made on a ground prohibited by Title VII or the ADEA. The court of appeals correctly rejected that contention. Although Article VIII(1) gives Korean companies a right to fill executive positions in the United States with Korean citizens because of their Korean citizenship,

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its choice does not encompass the right to fire an existing employee (Pet. App. A9-A13). The court reasoned that MacNamara's replacement, who was a Korean national, served as an "executive" (even if MacNamara did not), and that the right to "engage" the replacement necessarily encompassed the incidental right to terminate MacNamara so that his duties could be assigned to the replacement (*ibid.*).

it does not sanction employment decisions that are based on race, sex, religion, age, or even national origin.[5]

a. The limited reach of Article VIII(1) is clear from its background. The FCN Treaty between the United States and Korea is one of a series of FCN treaties entered into by the United States after World War II. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 181 n.6, 185 & n.13 (1982). All of the FCN treaties contain an employment privilege that is similar to Article VIII(1) of the FCN Treaty with Korea. The negotiators on behalf of the United States insisted upon those provisions for a specific reason. When the postwar FCN treaties were being negotiated, many countries had "percentile" restrictions that required United States companies operating abroad to hire a certain percentage of their workforce from the host country. As this Court has recognized, the employment provisions in the FCN treaties "were intended to avoid the effect of strict percentile limitations on the employment of Americans abroad and 'to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.'" *Sumitomo*, 457 U.S. at 181 n.6, quoting Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l Law, 373 383 (1956). By overriding percentile laws, the FCN treaties were designed to enable United States companies to hire United States citizens for key positions abroad and to grant reciprocal rights to the companies of our treaty partners.

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[5] Nationality (or citizenship) does not mean the same thing as national origin. Nationality refers to the status of belonging to a country through birth or naturalization; national origin refers to the country from which a person or his ancestors came. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

The negotiating history of the FCN treaties confirms this purpose of the employment provisions, as this Court recognized in *Sumitomo*. There, the Court quoted diplomatic correspondence stating that the purpose of the parallel provision in the FCN Treaty with the Federal Republic of Germany was " 'to preclude the imposition of "percentile" legislation.' " See 457 U.S. at 181 n.6, quoting Foreign Service Despatch No. 2529 from Bonn, at 1 (Mar. 18, 1954) (C.A. Supp. App. 21).[6] By contrast, there is nothing in the negotiating histories of the FCN treaties to suggest that the employment provisions were designed to excuse a foreign company from complying with those nondiscrimination requirements of domestic law that do not prohibit it from engaging its own nationals to fill key positions.

Indeed, the purpose of the employment provisions is directly expressed in the FCN Treaty with Uruguay, which served as the model for most subsequent FCN treaties. That Treaty conferred a right to hire key personnel "regardless of nationality." Treaty of Friendship, Commerce and Economic Development, Nov. 23, 1949, United States-Uruguay, art. V(4) *reprinted in* 96 Cong. Rec. 12,083 (1950). This language clearly conveys the understanding that foreign companies would be free to select executives and other essential personnel on the basis of their nationality, but does not imply a sweeping immunity from

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[6] See also Foreign Service Despatch No. 144 from The Hague, at 4 (Aug. 16, 1954) (C.A. Supp. App. 32) ("the big problem to which the sentence * * * was addressed was so-called percentile legislation"); Foreign Service Despatch No. 914 from Brussels, at 5 (Mar. 11, 1955) ("the abuse the sentence was designed to correct [was] 'percentile' laws and other governmental fiats circumscribing freedom of choice of high-grade personnel on a purely nationality basis") (C.A. Supp. App. 39).

all domestic employment laws. Although some subsequent treaties that were modeled on the Uruguayan Treaty retained the "regardless of nationality" language, most did not. This difference in language was not intended to effect a change in meaning; rather, the phrase "of their choice" in the Korean and other FCN treaties (quoted at pages 2-3, *supra*), is simply shorthand for "of their choice, regardless of nationality." See *Commercial Treaties: Hearing Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 9 (1953) (describing four treaties, including three with the shortened "of their choice" language, as containing a "[r]ight to engage technical and managerial personnel regardless of nationality.").

The second sentence of Article VIII(1) of the FCN Treaty also shows that foreign companies were to remain subject to domestic laws that do not interfere with the right to hire on the basis of nationality. The second sentence gives foreign companies the right to employ accountants and other experts who have not satisfied the professional standards of the host country, but only for particular purposes.[7] The clear implication is that companies normally must hire only those professionals who *do* have the qualifications required by the host country—a principle that is at odds with petitioner's notion that the first sentence of

[7] The second sentence of Article VIII(1) provides (8 U.S.T. 2223 (emphasis added)):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party, *for the particular purpose* of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises * * *.

Article VIII(1) grants a right of choice that is unfettered by domestic law.

Finally, the construction given Article VIII(1) by the court below is consistent with the broader object of the FCN treaties generally. As this Court explained in *Sumitomo*, "[t]he purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." 457 U.S. at 187-188. That purpose is expressed most directly in Article VII of the FCN Treaty with Korea, which gives foreign companies "national treatment with respect to engaging in all types of commercial, industrial, financial and other activities," including the right "to control and manage enterprises which they have established or acquired." 8 U.S.T. 2222. Under a regime of "national treatment," a foreign company is entitled to the same rights and is subject to the same responsibilities as a domestic company. *Sumitomo*, 457 U.S. at 188.

The employment privilege in Article VIII(1) is a "corollary" to this general principle of national treatment. Foreign Service Despatch No. 2529, *supra*, at 1 (C.A. Supp. App. 21). To be sure, the employment privilege is not written in "national treatment" terms, but that is only because it was necessary in this instance to go beyond strict national treatment in order to guarantee equality in the relevant sense. While percentile laws and other restrictions on the hiring of aliens applied to domestic and foreign employers alike, they had a far more severe impact on foreign employers, who were prevented from hiring their own nationals. Article VIII(1) therefore relieves foreign employers from the effect of such laws, even if local employers remain subject to them. In

this way, Article VIII(1) gives foreign employers the same access to their citizens for executive positions as local companies have to their citizens, and thereby establishes a basis for competitive equality.

Unlike percentile restrictions, the provisions of Title VII and the ADEA that prohibit discrimination on grounds other than citizenship do not place foreign companies at a competitive disadvantage; instead, they have precisely the same effect on foreign companies as on domestic companies. Accordingly, it would be inconsistent with the basic national-treatment framework of the FCN Treaty to rely on Article VIII(1) as a basis for implying an exemption from Title VII and the ADEA for the selection of key personnel by foreign companies. Just as local companies may not select employees on grounds such as race, national origin, and age, foreign companies may not do so.

b. For the foregoing reasons, the Department of State has interpreted the employment privileges in FCN treaties as providing no defense to claims of intentional discrimination based on race, sex, religion, national origin, or age. The Third Circuit properly gave "'great weight'" to this interpretation (Pet. App. A20-A21, quoting *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961)), just as this Court gave great weight to the Executive Branch's construction of the employment provisions of the Japanese FCN Treaty in *Sumitomo*, 457 U.S. at 184-185. See also *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 535-536 & n.17 (1987).

KAL asserts (Pet. 9) that the State Department's interpretation of Article VIII(1) conflicts with that of the Korean Government. The court of appeals, however, correctly "perceive[d] no conflict between the position of the United States government and that

of the Korean government" (Pet. App. A21 n.13). Significantly, KAL offers no support for its assertion that the Korean Government has taken a conflicting position. The only expressions of views by the Republic of Korea that are in the record in this case were set forth in two opinions issued by its Ministry of Foreign Affairs on October 25, 1984, which are discussed in an affidavit of the Counsellor to the Embassy of the Republic of Korea in Washington. See C.A. App. 779-780. In the first opinion, the Ministry of Foreign Affairs stated that the FCN Treaty would prevail over the domestic law of Korea *if* there were a conflict; in the second opinion, the Ministry took the position that the right of foreign companies to "engage" employees of their choice includes the right to terminate existing employees. *Ibid.* In neither opinion did the Ministry of Foreign Affairs express any view on the precise scope of the treaty right. In particular, it did not express a view on whether the Treaty gives a Korean company a right to choose a Korean national for an executive position when that choice is made on the basis of race, national origin, or age, rather than Korean citizenship. Nor are we aware of any other occasion on which the Republic of Korea expressed a view on that question. KAL therefore fails in its attempt to discredit the State Department's interpretation of Article VIII(1) by asserting that the Korean Government has adopted a contrary position.

c. KAL argues (Pet. 8) that its interpretation of Article VIII(1) is superior to that adopted by the Third Circuit because the former is consistent with the literal meaning of the "of their choice" language in Article VIII(1). For this reason, KAL further argues, the decision below disregards this Court's admonition in *Sumitomo* that the plain meaning of the FCN Treaty language should control in the absence

of substantial reasons to the contrary. See Pet. 8, citing 457 U.S. at 189. The issue here, however, is quite different from that in *Sumitomo*. There, the definitional provision of the FCN Treaty with Japan supplied an explicit answer to the question whether a subsidiary incorporated under the laws of the United States was to be regarded as a company of Japan. See 457 U.S. at 182. And it was that definitional provision to which the Court referred in *Sumitomo* in stating that the "literal language" of the FCN Treaty barred the subsidiary from invoking the protection of the employment provision. See *id.* at 183. Here, by contrast, neither Article VIII(1) nor the definitional provision of the FCN Treaty with Korea supplies a definition or further elaboration of the critical language "of their choice" in Article VIII(1).

Nor does the phrase "of their choice," in itself, have any one plain meaning. For example, the broadest (and perhaps most literal) construction of Article VIII(1) would give KAL the right to make an unfettered "choice" of executive personnel from among *American* applicants on grounds prohibited by Title VII and the ADEA—*e.g.*, it could select a white American over a black American, solely on the basis of race. KAL has recognized that such an interpretation is untenable, and it therefore has argued that Article VIII(1) affords it an absolute right of choice only when it selects a Korean national who holds a treaty trader visa. But this suggested limitation does not appear in the language of Article VIII(1), and it therefore serves to highlight that a proper construction of Article VIII(1) cannot depend on an effort to identify the supposedly literal or plain meaning of the phrase "of their choice," standing alone.[8]

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[8] KAL's argument that the literal language of the first sentence of Article VIII(1) gives it an absolute right of choice, unfettered by any restraints imposed by domestic law, is also

In these circumstances, it is most sensible to construe the phrase "of their choice" by reference to those restrictions on an employer's freedom of choice that the treaty Parties sought to eliminate. As we have shown, the Third Circuit's construction is based on that analysis, because it recognizes the right of a foreign company to select its own nationals on the basis of their *citizenship*, so that it can manage its investments and operations in the United States through personnel in whom it has the most confidence. By contrast, there is nothing in the text, structure, or background of the FCN treaties suggesting an intent to confer an affirmative right on a foreign company to make a "choice" that is not based on such legitimate business concerns, but instead is based on such otherwise prohibited and extraneous factors as race, sex, national origin, or age. Thus, the interpretation adopted by the Third Circuit gives effect to the central purpose of Article VIII(1), while at the same time avoiding an expansive interpretation that would unnecessarily bring that Article into conflict with intervening legislation that embodies the profound national commitment to eliminating discrimination. Compare *Bryan* v. *Itasca County*, 426 U.S. 373, 386-387 (1976).[9]

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inconsistent with the language of the second sentence of that Article. The second sentence plainly contemplates that a foreign company may engage only those professional personnel who possess the qualifications required by domestic law, except in certain limited circumstances. See pages 8-9 & note 7, *supra*.

[9] In any event, this Court made clear in *Sumitomo* that even where the language of a treaty is clear, it does not control when it produces a result that is demonstrably inconsistent with the intent of the parties and the construction given the treaty by responsible Executive Branch personnel. 457 U.S. at 185. That would be the result of KAL's interpretation here.

d. KAL contends (Pet. 9) that the ruling below will discourage foreign investment in the United States because foreign companies cannot choose their executives with complete assurance that their decisions will not be challenged in court. But under the Third Circuit's decision, if a foreign company hires its executives on the basis of their citizenship, it will have a complete defense to a suit under Title VII and the ADEA. Given this important protection, there is no reason to believe that the ruling below will substantially deter foreign investment. It is significant in this regard that the Third Circuit's decision in this case is not a novel development; it is consistent with the position of the Executive Branch and with the general thrust of other court of appeals' decisions. See pages 16-17, *infra*. Yet despite this general consensus in recent years, we are not aware of any indication that foreign investment has been deterred as a result of this construction of the FCN treaties and their interaction with domestic antidiscrimination laws; indeed, we have been informed by the Department of State that it has not received any representations by foreign governments to that effect.

KAL's fear that American courts will not honor the FCN Treaty defense because of prejudice against foreign companies is simply unfounded. As the court of appeals concluded, while "factfinders can and do err from time to time," there is no reason to think that the plaintiff in this case is "more likely to succeed than any other employment discrimination plaintiff in convincing the trier of fact that the decision was made for some different, impermissible reason" (Pet. App. A22-A23).

2. KAL argues (Pet. 7-8) that the Court should grant certiorari to resolve a conflict between the Third Circuit's decision in this case and the decisions of the Second, Fifth and Sixth Circuits in *Avigliano*

v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), vacated on other grounds, 457 U.S. 176 (1982); *Spiess* v. *C. Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982); and *Wickes* v. *Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). Contrary to KAL's contention, however, there is no live conflict warranting review by this Court.

Only one of the three appellate decisions upon which KAL relies has any current precedential force—the Sixth Circuit's ruling in *Wickes*. However, the Sixth Circuit there adopted precisely the same construction of the parallel employment privilege in the FCN Treaty with Greece as the Third Circuit adopted here. *Wickes*, 745 F.2d at 367-369. In *Sumitomo* and *Spiess*, the Second and Fifth Circuits first held that companies incorporated in the United States but controlled by foreign corporations were entitled to the protection of the employment privilege under the FCN Treaty with Japan; it was on that predicate that the Second and Fifth Circuits then construed the scope of the privilege. This Court subsequently held in *Sumitomo* that a subsidiary of a foreign company that is incorporated under the laws of the United States is a company of the United States, not of the foreign country, and that the subsidiary therefore cannot claim the protection of the employment privilege in the Treaty. The Court therefore vacated the lower court judgments in both *Sumitomo* and *Spiess*. Accordingly, the rulings by the Second and Fifth Circuits regarding the scope of the employment privilege have no current precedential effect (*O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n.12 (1975)), and do not give rise to a live conflict with the decision below and *Wickes*.

Moreover, it is unclear to what extent the now-vacated rulings in *Sumitomo* and *Spiess* departed, at

least as a practical matter, from the view adopted by the Third and Sixth Circuits in this case and *Wickes*. The opinions in both cases agreed that the purpose of the employment privilege was to overcome percentile legislation and to afford foreign companies the right to hire their own nationals for executive positions. *Sumitomo*, 638 F.2d at 559; *Spiess*, 643 F.2d at 359-363. In addition, although the precise holdings by the Second and Fifth Circuits are subject to varying interpretations, their focus was different from that of the court below and the Sixth Circuit in *Wickes*. *Sumitomo* and *Spiess* principally involved the question whether the FCN Treaty with Japan gives a foreign company an absolute right to select executives on the basis of nationality. The Fifth Circuit concluded that the Treaty does confer such a right (*Spiess*, 643 F.2d at 362), while the Second Circuit concluded that the foreign company must justify such a preference as a bona fide occupational qualification (*Sumitomo*, 638 F.2d at 558-559). Neither *Sumitomo* nor *Spiess* expressly addressed the distinct question presented by KAL here: whether the FCN Treaty confers a right to select a foreign national on grounds *other* than nationality, such as race, national origin or age.[10]

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[10] The Fifth Circuit in *Spiess* expressly held only that the treaty provision served to exempt a company of Japan from domestic discrimination laws "to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions" (643 F.2d at 359; see also *id.* at 362 & n.8).

The Second Circuit's approach in *Sumitomo* would have imposed a burden on a foreign company in excess of that imposed by the Third Circuit in this case, because it would have required the company to offer a special justification even for the selection of an employee based on his Japanese citizenship. See Pet. App. A22 n.14. Because KAL therefore is not aggrieved by the Third Circuit's failure to adopt the

In any event, the Second and Fifth Circuits addressed the scope of the employment privilege in the FCN treaties in a considerably different posture than did the court below and the Sixth Circuit in *Wickes*. The Second and Fifth Circuits did not have the benefit of this Court's opinion in *Sumitomo*, which considered the background and purposes of the FCN treaties; they did not have before them much of the negotiating history of the employment provisions; and they did not have the benefit of the fully developed views of the Department of State, which are entitled to considerable weight in construing the relevant treaty provisions. Should the issue again come before the Second and Fifth Circuits, they will be entirely free to reexamine the views expressed in their now-vacated decisions in *Sumitomo* and *Spiess* in light of these important intervening events and sources of guidance. It is quite possible that such a reexamination would lead them to reach the same conclusion as the Third and Sixth Circuits in this case and *Wickes*. If they do not do so, there will be time enough for this Court to consider the issue.

**B. MacNamara's Cross-Petition**

1. MacNamara urges (Cross-Pet. 7-10) the Court to grant review of the holding below that Article VIII(1) precludes a challenge to a foreign company's citizenship preference on the ground that it has a disparate impact on the basis of national origin. Review is not warranted, however, because this was an issue of first impression in the courts of appeals and because the resolution of it by the court below was clearly correct. As we have explained, the right of a

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Second Circuit's approach, this would not be an appropriate vehicle for resolving any conflict between the decision below and the Second Circuit's decision in *Sumitomo* even if the latter had not been vacated by this Court.

foreign company to prefer its own citizens for executive positions is precisely what the FCN Treaty protects. Accordingly, as the court of appeals concluded (Pet. App. A24-A25), MacNamara's disparate impact claim seeks to impose liability on KAL for doing nothing more than exercising its treaty right.

MacNamara relies (Cross-Pet. 8) on the proposition that the treaty right was designed only to eliminate the effect of percentile restrictions and other ultra-nationalistic laws, which he seeks to distinguish from the limitations imposed by the disparate-impact reach of the antidiscrimination laws of the United States. But the vice of percentile laws was that they interfered with a foreign company's freedom to select citizens of its own country to fill executive and other key positions. MacNamara's disparate-impact theory of liability would have the same effect.

MacNamara correctly points out (Cross-Pet. 8-9) that the legislative history of the Senate's ratification of the FCN treaties indicates that they were not intended to interfere with state antidiscrimination laws or to permit racial discrimination against American citizens. However, when the Senate was considering the treaties, the concept of "discrimination" was generally understood to mean dissimilar treatment. There was no established theory of disparate-impact discrimination, much less any case law suggesting that a foreign company's citizenship preference could be successfully attacked under such a theory. Thus, although the legislative history cited by MacNamara reinforces the court of appeals' conclusion that the treaty privilege does not sanction purposeful discrimination on grounds prohibited by Title VII, it does not support MacNamara's argument that he should be permitted to challenge KAL's use of a citizenship preference on disparate-impact grounds.

Relying on *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888), MacNamara argues (Cross-Pet. 10) that any conflict between the treaty privilege on the one hand and Title VII and the ADEA on the other should be resolved in favor of the latter, since they were enacted more recently. But this last-in-time rule applies only when Congress has clearly expressed its affirmative intent to override a prior treaty. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). As the court of appeals concluded (Pet. App. A21), Congress did not express any such affirmative intent when it enacted Title VII or the ADEA. In any event, there is no conflict between the treaty right and Title VII (or the ADEA). Article VIII(1) reflects a categorical determination, having legislative effect, that foreign companies have a substantial business justification for hiring executive personnel on the basis of nationality. Such a practice is therefore both protected by the Treaty and consistent with federal antidiscrimination law. See *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2125-2126 (1989) (employment practice that has a disparate impact, but which significantly serves an employer's legitimate business goals, does not violate Title VII).

2. The remaining issues raised by MacNamara also are ones of first impression that clearly do not warrant review. MacNamara's claim (Cross-Pet. 10-11) that KAL's right to "engage" a Korean citizen does not encompass the right to fire an American national to make way for the Korean replacement is without merit. "[A]s a matter of statutory interpretation, * * * absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment.'" *Carlucci* v. *Doe*, 109

S.Ct. 407, 411 (1988). Furthermore, as the court of appeals observed, "[a] contrary reading of Article VIII(1) would tend to freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel" (Pet. App. A11). Like the court of appeals, "[w]e are confident that the drafters of the Treaty did not intend such a result" (*ibid.*).

The question whether the court of appeals properly focused on the "executive" status of MacNamara's Korean successor, rather than on MacNamara's own status (see Cross-Pet. 11), can arise only in those rare instances in which the job responsibilities of a replacement are so different from those of his predecessor that one is properly classified as an executive, while the other is not. It therefore is not of sufficient importance to warrant review. Moreover, the court of appeals reasonably focused on the "executive" status of MacNamara's replacement, since the employment privilege protects the foreign company's choice to "engage" citizens of its own country to protect its business interests. A foreign company's freedom to do so should not depend on whether the foreign national will fill an existing position with established duties or instead will occupy a newly created position having some duties that previously were performed by an employee of a lower rank.[11]

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[11] We take no position on the merits of the remaining question presented by MacNamara (Cross-Pet. 11-12): whether the district court abused its discretion in enforcing a discovery cut-off date. But that fact-bound issue does not in any event satisfy this Court's usual standards for review.

## CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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